Supreme Court, U.S.
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No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF FOR WILLIAMS ALASKA PETROLEUM INC.

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition for Williams Alaska Petroleum Inc. remains accurate.

SUPPLEMENTAL BRIEF FOR WILLIAMS ALASKA PETROLEUM INC.

In its supplemental brief, petitioner contends that a recent order issued by the Federal Energy Regulatory Commission ("FERC") "resolves in petitioner's favor two issues raised by respondents in this proceeding" and therefore removes those obstacles to this Court's review. Pet. Supp. Br. 1. Petitioner's eleventh-hour effort to salvage its arguments in favor of certiorari is unavailing.

Petitioner first argues that FERC's order rejecting Flint Hills' interpretation of Section 4412(b)(2) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users conclusively establishes that "the rule of § 4412(b)(2), were it applied to petitioner's case, would allow full refunds to Exxon Mobil back to 1993." Pet. Supp. Br. 3. But petitioner fails to mention that FERC's order in the Flint Hills matter explicitly identified this TAPS Quality Bank proceeding as an example of a case in which its interpretation of Section 4412(b)(2) would *not* apply. Supp. App. 9a.

In the Flint Hills order, FERC recognized that, as a general matter, "the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding" within the meaning of Section 4412(b)(2) is the date of "the first order issued by the Commission . . . impos[ing] a quality bank adjustment by changing the valuation of" a petroleum cut and that Section 4412(b)(2) "does not require the adjustment in the first order be final." Supp. App. 8a. FERC also declared, however, that this general rule would not apply "in the case of an 'unlawful order'" imposing quality bank adjustments—which,

FERC explained, "apparently is the situation that motivated Congress to adopt the 15-month limitation" imposed by Section 4412(b)(2). *Id.* at 9a. As an example of such an "unlawful order," FERC pointed to its original order in this case, which "accepted certain quality bank valuations" that were subsequently "reversed" by the D.C. Circuit "and remanded . . . to the Commission for further action." *Id.* at 9a n.11.

By explicitly invoking this case, FERC made clear that, if Section 4412(b)(2) had been applicable to this proceeding, the "date of the first order of the [FERC] imposing quality bank adjustments" would not have been the date on which FERC issued its unlawful 1993 order but would instead have been the date of the ALJ's 2005 decision ordering refunds of Quality Bank Resid component adjustments. Pet. App. 165-92a. Thus, as explained in Williams' brief in opposition, the application of Section 4412(b)(2) in this case would actually have provided petitioner with a shorter refund period than Section 4412(b)(1), which provides it with refunds back to February 1, 2000. Williams Br. in Opp. 14. The fact that petitioner received a more generous refund period under Section 4412(b)(1) than it would have received under Section 4412(b)(2) irretrievably nullifies petitioner's constitutional objections to Section 4412(b)(1).

Petitioner also contends that FERC's order in the Flint Hills matter conclusively establishes that Section 4412(b)(1) impermissibly "direct[ed] the outcome of the adjudicatory proceeding that determined petitioner's relief" because that order recognizes that FERC "'limited the retroactive period'" in this case "'*in accordance with the Congressional limitation in section 4412(b)(1).*'" Pet. Supp. Br. 4 (quoting Supp. App. 9a n.11) (emphasis added by petitioner). But, as this Court has frequently reiterated, Congress

may amend applicable law without violating the separation-of-powers principles articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *See, e.g.*, *Miller v. French*, 530 U.S. 327, 349 (2000). Section 4412(b) falls comfortably within Congress's constitutional authority because it "amends the applicable substantive law" governing refunds in TAPS Quality Bank proceedings. *Nat'l Coalition to Save our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001).

Ultimately, the arguments raised in petitioner's supplemental brief are therefore completely beside the point. Even if FERC had authoritatively construed Section 4412(b)(2) in the manner that petitioner suggests, the Flint Hills order would not have altered the fact that petitioner's constitutional challenge to Section 4412(b)(1) is conclusively foreclosed by this Court's precedent, which—as petitioner itself acknowledges (Pet. 12)—establishes that *Klein*'s "prohibition does not take hold when Congress amend[s] applicable law." *Miller*, 530 U.S. at 349; *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Nothing in FERC's recent order provides any conceivable basis for revisiting that unbroken line of authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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